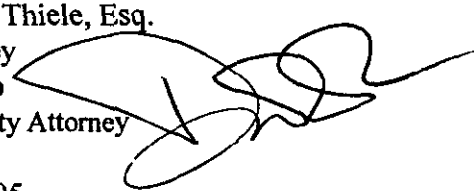


BOARD OF COUNTY COMMISSIONERS

INTERDEPARTMENTAL MEMORANDUM

TO: Jim Pilcher
Chief, Survey and Right of Way Services

FROM: Herbert W.A. Thiele, Esq.
County Attorney
Daniel J. Rigo
Assistant County Attorney 

DATE: January 3, 2005

SUBJECT: Whispering Pines East Subdivision; 2/3 2/3 Paving Project
Issues with Acquisition Process

You have requested that our office review the Declaration of Restrictive Covenants, plat map, and various other documents involving the referenced matter in order to determine the most cost-effective method for acquiring the necessary right-of-way for the project. It is our understanding that the preferred method, if possible, would be to accept a deed from the Whispering Pines East Subdivision, Inc. (the HOA) conveying to the County any of its interest in the easements for roadways encumbering the subdivision's 138 lots. The alternative, which would be significantly more time-consuming and expensive, would be to negotiate an acquisition with the owners of each of the 138 lots adjoining the right-of-way needed for the project (which we understand to total approximately 130 owners).

We have reviewed the following documents:

1. Three sets of Declaration of Restrictive Covenants executed and recorded by Clyde and Elizabeth Atkinson as Owners of WHISPERING PINES EAST, a Mobile Home Subdivision (hereinafter the Subdivision Owners), as follows:
 - a. O.R. 1063/1228 dated 4/25/1983 (superseded by subsequent Declaration at O.R. 1065/1754);
 - b. O.R. 1065/1754 dated 5/13/1983 (expired automatically on 5/13/2003 in accordance with paragraph 26); and
 - c. O.R. Book 1141/1041 dated 12/10/1984 and encumbering 24 lots (expired automatically expire on 12/10/2004 in accordance with paragraph 26); and
2. Nine sets of Declaration of Restrictive Covenants discovered in a public records name search, each of which is executed by an Owner(s) of a lot(s) in WHISPERING PINES EAST, a Mobile Home Subdivision (hereinafter the Lot Owners). These Declarations were all dated between 12/1/1987 and 3/30/1989 and each of them will automatically expire after 20 years

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in accordance with paragraph 26, unless extended for a successive 20-year period by an instrument signed by a majority of the members of the homeowners' association. The Declarations collectively encumber a total of 10 lots.

The Declarations of the Subdivision Owners and the Lot Owners are similar in that they each grant to the HOA a perpetual easement for a variety of uses including, "the conveyance and use of electricity, telephone, gas, water, or other public conveyance or utilities." The easement does not, however, specifically allow the use of roadways. In our opinion, the only possible way for the easements to include the roadways would be to interpret the term "other public conveyances" to include roadways, and a challenge to such an interpretation would be difficult to defend.

Even if the Declarations were to be accepted as providing the HOA with an easement for the roadways, there are additional problems. The Declaration from the Subdivision Owners automatically expired on December 10, 2004, which would eliminate the HOA's easement interests in those 24 lots covered by that Declaration.

In addition, the other 10 lots covered by the Declarations from the Lot Owners will begin reaching the automatic expiration dates as soon as December 1, 2007, unless extended for a successive 20-year period by an instrument signed by a majority of the members of the HOA. Therefore, in order to accept a conveyance of those 10 lots from the HOA, we would require that the Declarations be extended in order to allow the County a sufficient time period after the construction and maintenance of the new roadways to allow a statutory presumed dedication to the County and for the filing of a maintenance map to officially acknowledge the dedication. Upon the presumed dedication, under Fla. Stat. §95.361, any subsequent automatic expiration of the extended Declarations would not affect the County's ownership in the roadways.

In summary, based on our review of the documentation noted above, the only lots available for conveyance from the HOA to the County are the 10 lots covered by the Declarations from the Lot Owners. However, the County's acceptance of the conveyance of those 10 lots would be subject to the Declarations being extended for a successive 20-year period by an instrument signed by a majority of the members of the HOA. In order to acquire the interests in the remaining 128 lots needed to construct the project, it will be necessary to negotiate separately with each of those lot owners. If we can be of any further assistance, please contact our office.

DJR/jm

cc: Joe Brown, Director of Engineering Services
Mitzi McGhin, Right of Way Agent